

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CAP CO., LTD.,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

No. 2:14-cv-01899-MJP

**DEFENDANT MICROSOFT  
CORPORATION'S RESPONSE  
TO PLAINTIFF CAP CO.,  
LTD.'S MOTION TO  
RECONSIDER**

Noting date: May 1, 2015

Pursuant to the Court's April 22, 2015 Minute Order (Dkt. 73), Defendant Microsoft respectfully submits this response to Plaintiff CAP Co.'s Motion to Reconsider. Dkt. 72.

### **I. Introduction**

CAP Co. offers no legitimate basis for this Court to reconsider its dismissal with prejudice of CAP Co.'s claims for indirect infringement (both induced and contributory) and willful infringement. CAP Co. points to no manifest error in the Court's ruling, nor does it cite any new facts or legal authority that it could not have brought to the Court's attention earlier when opposing Microsoft's motion to dismiss. Instead, CAP Co. rehashes its prior arguments, and cites legal authority that predates – by *years* – the parties' briefing on Microsoft's motion, and thus cannot serve as a basis for reconsideration. CAP Co.'s reconsideration motion does not address its claim for willful infringement, and does not appear to contest the propriety of the Court's dismissal of that claim with prejudice.

CAP Co.'s reconsideration motion also improperly requests relief that it did not previously seek—*i.e.*, a third try at plausibly pleading claims for indirect infringement. *See* Dkt. 63. Although Microsoft's motion sought dismissal of CAP Co.'s indirect infringement claims *with prejudice* (Dkt. 42 at 12), in its opposition CAP Co. ignored this entirely and did not request leave to amend its Complaint again. The Court should reject CAP Co.'s effort to obtain on a motion for reconsideration relief that it never previously sought.

In any event, CAP Co. has had two tries to plausibly plead induced and contributory infringement, and has twice failed to do so. It is therefore well within the Court's discretion to dismiss these claims with prejudice. *See Superior Indus., LLC v. Thor Global Enters. Ltd.*, 700 F.3d 1287, 1289, 1295-96 (Fed. Cir. 2012) (affirming district court's dismissal with prejudice of claims for indirect infringement set forth in Plaintiff's First Amended Complaint which fell "far short of pleading facts necessary to state a plausible claim for either induced or contributory infringement.").

CAP Co. is correct that the Court dismissed its claims for *direct* infringement *sua sponte*. Moreover, the Court's order can be read to apply the standard for pleading willful

1 infringement to CAP Co.'s claim for direct infringement. If in fact the Court did apply the  
 2 standard for pleading willful infringement in deciding to dismiss CAP Co.'s direct infringement  
 3 claim, Microsoft respectfully submits that it would have been error for the Court to do so.

4 Regardless of what the Court decides concerning CAP Co.'s claims for direct  
 5 infringement, CAP Co. offers no justifiable basis for reconsideration of the Court's Order  
 6 dismissing the claims for indirect infringement and willfulness. Accordingly, Microsoft  
 7 respectfully requests that CAP Co.'s motion for reconsideration be denied as to the claims for  
 8 induced, contributory and willful infringement.

9 **II. Microsoft Apprised CAP Co. Early On Of The Deficiencies In Its Pleadings But**  
 10 **CAP Co. Did Not Correct Them**

11 On July 3, 2014, CAP Co. filed its original Complaint in this action alleging that a host  
 12 of Microsoft products infringe the patents-in-suit, and that Microsoft was liable for (1) direct  
 13 infringement, (2) induced infringement, (3) contributory infringement and (4) willful  
 14 infringement. Dkt. 1. CAP Co.'s claims for indirect infringement (both induced and  
 15 contributory) and willful infringement fell far short of the pleading standards set forth in the  
 16 U.S. Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v.*  
 17 *Twombly*, 550 U.S. 544 (2007) because CAP Co. failed to plead facts necessary to state a  
 18 plausible claim for either indirect or willful infringement. Thus, on October 24, 2014,  
 19 Microsoft moved to dismiss those claims. Dkt. 17.

20 In that initial motion, Microsoft pointed out, *inter alia*, that CAP Co.'s Complaint failed  
 21 to allege facts plausibly showing that: (1) Microsoft specifically intended its customers to  
 22 infringe and knew that its customers' acts constituted infringement as is required to state a  
 23 claim for induced infringement; (2) the accused products have no substantial non-infringing  
 24 uses as is required to state a claim for contributory infringement; and (3) Microsoft was  
 25 objectively and subjectively reckless as is required to state a claim for willfulness. *Id.* at 6-11.

26 Rather than respond to Microsoft's motion, CAP Co. chose to file an Amended  
 27 Complaint ("FAC"). Dkt. 33. CAP Co.'s FAC, however, suffered from the same deficiencies

1 as its original Complaint. Accordingly, on December 2, 2014 Microsoft filed a second motion  
 2 to dismiss CAP Co.'s claims for indirect infringement and willfulness, advancing the same  
 3 arguments that it made in its first motion. Dkt. 42. Since CAP Co. had had multiple  
 4 opportunities (and many months) to plausibly plead these claims, Microsoft asked that the  
 5 Court dismiss them with prejudice. *Id.* at 12.

6 On April 6, 2015, the Court issued an order holding, *inter alia*, that the FAC failed to  
 7 state a claim for contributory infringement, induced infringement and willful infringement.  
 8 Dkt. 70. The Court recognized that CAP Co. had already had two chances to plausibly plead  
 9 these claims, but had failed to do so, and properly held that further amendment would be futile.  
 10 Thus, the Court dismissed these causes of action with prejudice. Dkt. 70. CAP Co. then filed  
 11 its motion for reconsideration, and the Court called for Microsoft to respond. Dkt. 72, 73.

12 **III. There Is No Legitimate Basis For The Court To Reconsider Its Dismissal With**  
 13 **Prejudice Of CAP Co.'s Claims For Indirect Infringement And Willfulness**

14 "Motions for reconsideration are disfavored." L.R. 7(h). "The court will ordinarily  
 15 deny such motions in the absence of a showing of manifest error in the prior ruling or a  
 16 showing of new facts or legal authority which could not have been brought to its attention  
 17 earlier with reasonable diligence." *Id.* CAP Co. makes no such showing here. Nor does CAP  
 18 Co. make any showing under Fed.R.Civ.P. 60 that warrants the Court's reconsideration of its  
 19 prior order regarding indirect infringement and willfulness.<sup>1</sup>

20 Although unclear, with respect to its claims for indirect infringement, CAP Co. appears  
 21 to seek only reconsideration of the Court's refusal to afford CAP Co. a third attempt to  
 22 plausibly plead induced and contributory infringement. Dkt. 72 at 3-6. CAP Co. does not,  
 23 however, cite a single new fact or legal authority that would warrant reconsideration of this  
 24 Court's prior order, much less facts or legal authority that could not have been presented earlier  
 25 in the exercise of reasonable diligence. Instead, CAP Co. (1) alternates between rehashing its  
 26 prior arguments regarding the sufficiency of the FAC and arguing that it could plead

27 <sup>1</sup> CAP Co. purports to bring this motion pursuant to Fed.R.Civ.P. 60 in addition to L.R.7(h) (Dkt. 72 at 1), but  
 does not apply Rule 60 in its briefing or explain what section of the rule it is relying upon.

1 unspecified facts in support of its claims for indirect infringement if permitted to amend, and  
 2 (2) cites cases that were in existence years prior to the parties' briefing on Microsoft's motion,  
 3 and thus cannot constitute "new" law within the meaning of L.R. 7(h). Dkt. 72 at 3-6.

4 Although CAP Co. asserts that the Court erred by dismissing CAP Co.'s indirect  
 5 infringement claims with prejudice, it provides no support for this assertion, and, in fact, the  
 6 law is to the contrary. Indeed, in *Superior Indus.*, 700 F.3d at 1289, 1295-96, the Federal  
 7 Circuit explicitly approved dismissal with prejudice claims for indirect infringement where, as  
 8 here, a plaintiff failed to plausibly plead them in a FAC.

9 The propriety of the Court's action is further buttressed by the fact that, although  
 10 Microsoft sought dismissal of CAP Co.'s claims *with prejudice*, in its opposition to Microsoft's  
 11 motion, CAP Co. did not ask the Court for leave to amend its Complaint further. It was not  
 12 error, much less manifest error, for the Court not to provide relief that CAP Co. did not ask for.

13 In any event, whether to permit amendment is within this Court's "sound discretion."  
 14 *Terrell v. JPMorgan Chase Bank N.A.*, No. C14-930 MJP, 2014 U.S. Dist. LEXIS 151291, at  
 15 \*2 (W.D. Wash. Oct. 24, 2014). CAP Co. had two shots at plausibly pleading claims for  
 16 indirect infringement. The Court rightly found that CAP Co. failed to do so, and that further  
 17 amendment would be futile. Dkt. 70 at 4-5, 7-8. CAP Co.'s only response to the Court's  
 18 "futility" finding is its unsupported argument that it could meet the pleading standard if given  
 19 yet another opportunity to do so. Dkt. 72 at 6. CAP Co.'s unsupported contention that it could  
 20 meet the pleading standard if afforded another attempt, however, is not grounds for  
 21 reconsideration, either under L.R. 7(h) or Fed. R. Civ. P. 60.

#### 22 **IV. The Court's Dismissal Of CAP Co.'s Claims For Induced Infringement,** 23 **Contributory Infringement, And Willful Infringement Was Proper**

24 In any event, the Court properly held that CAP Co. failed to plead causes of action for  
 25 induced and contributory infringement and willfulness. *First*, with respect to induced  
 26 infringement, the Court correctly recognized that to survive a motion to dismiss CAP Co.'s  
 27 Complaint must "contain facts plausibly showing" that Microsoft specifically intended its

1 customers to infringe CAP Co.’s patents and knew that its customers’ acts constituted  
 2 infringement. Dkt. 70 at 3 (citing *In re Bill of Lading Transmission & Processing Sys. Patent*  
 3 *Litig.*, 681 F.3d 1323, 1339 (Fed. Cir. 2012)). The Court also correctly found that “there is no  
 4 question that the FAC alleges no facts from which the Court can even reasonably infer that  
 5 Plaintiff can establish those elements.” *Id.* at 4.<sup>2</sup> In its reconsideration motion, CAP Co. points  
 6 to no new facts or law or error in the Court’s analysis that would justify reconsideration of the  
 7 Court’s prior ruling. Instead, CAP Co. devotes a few sentences to arguing – again – that its  
 8 FAC meets the *In re Bill of Lading* standard and plausibly pleads a cause of action for induced  
 9 infringement. Dkt. 72 at 5-6. That is an insufficient basis, under any standard, for the Court to  
 10 reconsider its prior order.

11 *Second*, with respect to contributory infringement, the Court properly held that CAP Co.  
 12 did not plead facts from which the Court could reasonably infer that the accused products have  
 13 “no substantial non-infringing uses,” as required to state a claim for contributory infringement.  
 14 Dkt. 70 at 4 (quoting *Bill of Lading*, 681 F.3d at 1337). The Court correctly observed that CAP  
 15 Co. accused nearly fifteen different Microsoft products, including several complex Microsoft  
 16 Windows operating systems, yet offered nothing more than the “conclusor[y]” allegation that  
 17 these complex products “have no use other than infringing one or more claims of the Patents-  
 18 in-Suit.” *Id.* at 4-5. The Court properly took judicial notice that the accused Windows  
 19 operating systems and Windows-based PCs “perform a multitude of functions,” and correctly  
 20 concluded that CAP Co.’s allegation that the accused products lack substantial non-infringing  
 21 uses “borders on a frivolous allegation.” *Id.* at 5.

22 In its motion for reconsideration, CAP Co. now admits, as it must, that the accused  
 23 Windows products *do* have “substantial non-infringing uses.” Dkt. 72 at 3. CAP Co. asserts,  
 24 however, that in determining whether it sufficiently pled a cause of action for contributory  
 25 infringement the Court should have focused on whether CAP Co. plausibly pled that a specific

26 <sup>2</sup> In fact, the Court correctly found that CAP Co.’s pleading did even not meet the “ultra-basic” (albeit erroneous)  
 27 standard for pleading induced infringement advanced by CAP Co. *Id.*

1 *component* of the accused products has no substantial non infringing uses. *Id.* at 3-4. CAP Co.,  
2 however, does not specify what components it is referring to, and the FAC does not set forth  
3 any facts plausibly showing that any “component” of any of the accused devices lacks  
4 substantial non-infringing uses.

5 CAP Co. points to paragraphs of the FAC that it contends satisfy the pleading  
6 requirement for contributory infringement. Dkt. 72 at 4 (quoting FAC ¶¶ 11, 15, 17). These  
7 paragraphs, however, contain nothing more than a laundry list of accused products and a  
8 formulaic recitation of the elements of a cause of action for direct and contributory  
9 infringement. A complaint must contain “more than labels and conclusions, and a formulaic  
10 recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

11 Moreover, the Court explicitly considered these paragraphs of the FAC in its order  
12 dismissing CAP Co.’s claims for contributory infringement with prejudice, and found that they  
13 contained only conclusory allegations that do not meet the standard for pleading contributory  
14 infringement. Dkt. 70 at 4-5. And, as elsewhere in its motion, CAP Co. cites no new law that  
15 would warrant the Court’s reconsideration of its prior ruling. Rather, CAP Co. cites law that  
16 predates the parties’ briefing on Microsoft’s motion to dismiss, and that does not address the  
17 pleading standard for contributory infringement.

18 *Third*, with respect to willful infringement, the Court properly grounded its dismissal of  
19 CAP Co.’s cause of action in CAP Co.’s total failure to plead any facts from which the Court  
20 could reasonably infer that Microsoft was objectively or subjectively reckless. Dkt. 70 at 7. In  
21 any event, CAP Co. does not seek reconsideration of the Court’s dismissal with prejudice of its  
22 cause of action for willful infringement.

## 23 **V. Conclusion**

24 For the foregoing reasons, CAP Co.’s motion for reconsideration should be denied with  
25 respect to CAP Co.’s claims for induced infringement, contributory infringement and willful  
26 infringement.

1 DATED: May 1, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> day of May, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF which will send notification of such filing to the following:

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DATED this 1<sup>st</sup> day of May, 2015.

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